SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

617

October Term, 1968

SUZANNE G. OGLE,

Appellant,

vs.

V. A. HEIM, Auditor-Controller of the County of Orange, State of California,

Respondent.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

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LONG BEACH REPORTER

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IN THE

Supreme Court of the United States

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SUZANNE G. OGLE,

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vs.

V. A. HEIM, Auditor-Controller of the County of Orange, State of California,

Respondent.

STATEMENT AS TO JURISDICTION

The appellant, Suzanne G. Ogle, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

Decision of the Supreme Court of California.

This appeal is taken from a decision by the Supreme Court of California in the above entitled cause, reported at 69 Advance California Reports 1, affirming the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, Civ. No. 8343, unreported, both opinions being appended hereto.

Grounds on Which the Jurisdiction of this Court is Invoked.

Appellant filed a Petition for a Writ of Mandate with the Superior Court of the State of California for the County of Orange on behalf of her two minor children after refusal by respondent to honor an execution

against the pension of a retired county employee, filed on behalf of the employee's minor children under the provisions of Sec. 710 of the California Code of Civil Procedure, based upon the position taken by respondent that a minor child is a creditor and her father is a debtor and that under the provisions of Sec. 31452 of the California Government Code, proceeds of a pension are exempt from attachment or execution.

The decision of the Supreme Court of California sought to be reviewed was dated July 10, 1968, and a Petition for Rehearing having been filed by appellant, an order denying the Petition for Rehearing was filed by the Supreme Court of California on August 8, 1968. Notice of Appeal was filed with the Supreme Court of California on August 20, 1968.

Appellant contends that the decision of the Supreme Court of California deprives the two minor children of appellant, of a vested property right contrary to the provisions of the *Fourteenth Amendment to the United States Constitution.*

Jurisdiction of the Supreme Court of the United States to review the instant case upon appeal is conferred by Title 28, United States Code Secs. 1257 (2), (a) and 2101 (c).

Cases Sustaining the Jurisdiction of this Court.

Under the settled law of California, a child's right to support is property.

A vested right of action is "property" in the same sense in which tangible things are property, and is equally protected against arbitrary interference.

Anderson vs. Ott, 127 C.A. 122, 15 Pac. 2d 526.

The term "property" extends to every species of valuable right or interest. "Property" includes any valuable interest in or to any object of value that a person may lawfully acquire or hold, and also the right to be protected in one's personal privileges whether they be secured to him as a member of the commonwealth or as an individual. "Property" includes choses in action.

Scott vs. McPheeters, 33 C.A. 2d 629, 632, 92 Pac. 2d 678.

In an action for wrongful death under Sec. 377 of the *California Code of Civil Procedure*, of a husband and father, the cause of action of minor children was held to survive the defendant's death, and specifically

"the cause of action of respondents involving a diminution of their support both *in presente* and in expectancy which they would have received from the decedent.

Such support, although it came by virtue of Mr. Nash's earning power, was the "estate" of respondent, and the loss they suffered by reason of his death existed during the lifetime of Belyea. It follows that the latter estate is liable to respondents for such loss."

Nash vs. Wright, 82 C.A. 2d 475, 476, 186 Pac. 2d, 691.

In *Calhoun vs. Calhoun*, 81 C.A. 2d 297, 183 Pac. 922, the Court defined the right of support of a wife at page 301 as a "right existing by virtue of the marital status of contract and may be classified as a property right."

Sec. 14 of the *California Civil Code* provides in part as follows:

"The words 'personal property' include money,

goods, chattels, *things in action*, and evidences of debt."

In *Ponsonby vs. Sacramento Suburban Fruit Lands Co.*, 210 Cal. 229, the Court states as follows:

> "The term (property) is a generic one . . . When unqualified the term is sufficiently comprehensive to include every species of estate, both real and personal, whether choate or inchoate (citations), whether corporeal or incorporeal (citations). The word is sometimes used in the sense of 'estate' . . . Further with respect to property, it is stated in 50 Corpus Juris, pages 736-738, that 'Generally, the subjects of property comprise all valuable rights or interests protected by law . . . In the broad sense of the term, 'property' includes . . . choses in action . . . In modern legal systems, property includes practically all valuable rights. The term is indicative and descriptive of every possible interest which a person can have, extends to every species of valuable right or interest, and comprises a vast variety of rights. The right to be protected in a person's privileges belonging to him as an individual or secured to him as a member of the commonwealth, is property, as is any valuable interest in or to any object of value that a person may lawfully acquire or hold."

In *Lewis vs. Lewis*, 174 Cal. 336, the California Supreme Court states at page 339 as follows:

> "As a general proposition, no one would doubt that parents are under an obligation to support their minor children. This duty rests on fundamental natural laws and has always been recognized by the courts in the absence of any statute declaring it."

A chose in action is property under California law.

Bensinger vs. Davidson, 147 F.S. 240.

In *Strecker vs. Strecker*, 199 N.Y.S. 2d 111, 113, the court states as follows:

> " 'The duty of parents to provide for the *maintenance* of their children is a principle of natural law; an obligation laid upon them not only by nature herself, but by their own proper act, in bringing them into the world.' 1 Blackstone Commentaries on the Laws of England, 446-447, (11th ed. 1791)."

The Supreme Court of California holds in the case at bar that child support is a commercial debt, making the child a creditor and its father a debtor, and that the exemption provisions generally relating to a debtor and creditor relationship are applicable to a child's right to support.

In *Audubon vs. Shufeldt*, 181 U.S. 575, 577, 45 L. ed. 1009, this Court has held, interpreting the Bankruptcy Act of July 1, 1898, Chap. 541, that a claim for alimony is not a debt and is not dischargeable in bankruptcy.

Specifically this Court states at page 1010, as follows:

> "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state, and may therefore be there enforced by suit. *Barber vs. Barber* (1858) 21 How. 582 L. ed. 226;

Lynde vs. Lynde (1901) 181 U.S. 183, *ante*, 810, 21 Sup. Ct. Rep. 555. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings . . ."

In *Dunbar vs. Dunbar*, 190 U.S. 340, 47 L. ed. 1084 involving the same section of the Bankruptcy Act, this Court states at page 1092 as follows:

"In relation to that part of the husband's contract to pay for the support of his minor children until they respectively became of age, we also think that it was not of a nature to be proved in bankruptcy. At common law, a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the states . . .

We think it was not the intention of Congress, in passing a bankruptcy act, to provide for the release of the father from his obligation to support his children by his discharge in bankruptcy, and if not, then we see no reason why his contract to do that which the law obliged him to do should be discharged in that way. As his discharge would not, in any event, terminate his obligation to support his children during their minority, we see no reason why his written contract acknowledging such obligation and agreeing to pay a certain sum (which may be presumed to have been a reasonable one) in fulfilment thereof should be so discharged."

In *Seidenberg vs. Seidenberg* (Wash. D.C.) 225 F.2d

545, a proceeding by a wife who had obtained judgment against her husband for maintenance and support of minor children to enforce a judgment against the husband's interest as beneficiary of a trust, the Court held that the interest of a father as beneficiary of a *spendthrift trust* could be *invaded* for the support of his minor children. At page 549, the Court states as follows:

> "In every civilized country is recognized the obligation, sacred as well as lawful, of a husband to protect and provide for his family, and to sustain the claim of the husband in the case at bar would be to invest him with a right to be both a faithless husband and a vicious citizen. This case reaches beyond the concern of the immediate parties to it. It affects the status of the family as being the foundation of society and civilization, and hence in a very certain sense is of wide public concern."

Meyer vs. Nebraska, 262 U.S. 390, 67 L. ed. 1042 involved the application of the *Fourteenth Amendment to the United States Constitution* to a statute of the State of Nebraska forbidding the teaching of any but the English language in public schools, and this Court states at page 1045 as follows:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff in error by the 14th Amendment. 'No state . . . shall deprive any person of life, liberty, or property without due process of law.'
>
> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to con-

tract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

With relation to the right of a minor child to invade his father's spendthrift trust for support, it is stated in the *Restatement of Trusts, Second,* in Sec. 157 as follows:

"Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,

(a) by the wife or child of the beneficiary for support or by the wife for alimony; . . .
Comment on Clause (a):

b. *Dependents of the beneficiary.* Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against him for support by his wife or children. In some cases a spendthrift clause is construed as not intended to exclude the beneficiary's dependents. Even if the clause is construed as applicable to claims of his dependents for support, it is against public policy to give full effect to the provision. The beneficiary should not be permitted to have the enjoyment of his interest under the trust while neglecting to support his dependents. It is a matter for the exercise of discretion by the court having jurisdiction over the administration of the trust as to how much of the income under the trust should be applied for such support and how much the beneficiary himself should receive. Even though the beneficiary's wife has ob-

tained a decree for alimony directing the beneficiary to pay certain sums to her, she cannot compel the trustee to pay her the full amount so decreed unless the court which has jurisdiction over the administration of the trust deems it to be fair to the beneficiary himself to compel the trustee to make such payment. The result is much the same as though the trust were created, not solely for the benefit of the beneficiary, but for the benefit of himself and his dependents."

California Statutes Involved in Appeal

Appellant filed an affidavit with respondent under the provision of Sec. 710 of the *California Code of Civil Procedure* for the purpose of collecting child support under a valid judgment for such support from a pension due the minors' father from the County of Orange, and respondent refused to honor the affidavit filed under the statutory provisions by reason of the provisions of Sec. 31452 of the *California Government Code.*

Sec. 710 of the *California Code of Civil Procedure* reads in part as follows:

"(a) Whenever a judgment for the payment of money is rendered by any court of this state against a defendent to whom money is owing and unpaid by this state or by any county, city and county, city or municipality, quasi-municipality or public corporation, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows: . . .

(2) Filing with political subdivision.

2. If such money, wages or salary is owing and unpaid to such judgment debtor by any county, city

and county, city or municipality, quasi-municipality or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half the salary or wages owing by the county, city and county, city, municipality, quasi-municipality, or public corporation to the judgment debtor for his personal services to such public body rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor."

Sec. 31452 of the *California Government Code* reads as follows:

"The right of a person to a pension, annuity, retirement allowance, return of contributions, the pension, annuity, or retirement allowance, any optional benefit, any other right accrued or accruing to any person under this chapter, the money in the fund created or continued under this chapter, and any property purchased for investment purposes pursuant to this chapter, are exempt from taxation, including any inheritance tax, whether state, county, municipal, or district, and from any law relating to bankruptcy or insolvency. They are not subject to execution, garnishment, attachment, or any other process of court whatsoever, and are unassignable except as specifically provided in this chapter."

Issue Presented by this Appeal

The issue presented by this appeal is whether appelant's minor children were deprived of a vested property right in violation of the provisions of the *Fourteenth Amendment to the United States Consitution* by the decision of the Supreme Court of Calfornia holding that a minor's action for support from its father places the minor in the position of a commercial creditor and the father in the position of a commercial debtor, by interpreting Sec. 31452 of the *California Government Code* as exempting the pension of their father from execution by the minor children for support.

STATEMENT OF FACTS

This proceeding is based upon a petition for Writ of Mandate filed by appellant, and answers filed thereto by respondent and Joel E. Ogle, real party in interest.

The petition generally alleges that petitioner and Joel E. Ogle were husband and wife, and that petitioner has the custody of the two minor children of the parties, aged 9 and 10, respectively.

In a decree in an action for divorce between petitioner and Joel E. Ogle, the Court ordered Joel E. Ogle to pay for the support of each minor child the sum of One Hundred Fifty ($150.00) Dollars, or a total of Three Hundred ($300.00) Dollars per month payable on the 1st day of each month, commencing August 1, 1963. Joel E. Ogle was County Counsel of the County of Orange, now retired, and collects a retirement allowance from the County of Orange in the sum of Two Hundred Twenty-five ($225.00) Dollars per month, for life, which constitutes the return contributions made from community property during the marriage of petitioner and Joel E. Ogle.

Joel E. Ogle failed and refused to make the payments ordered by the court for child support, and on December 23, 1965, he was in arrears for payments due under the order for child support in the sum of One Thousand Three Hundred Fifteen and 43/100 ($1,315.43) Dollars.

Based upon the provisions of Sec. 710 of the *California Code of Civil Procedure*, and paying the fee required by law, petitioner served the affidavit and abstract of judgment on respondent on January 28, 1966.

Respondent refused to comply with the provisions of Sec. 710 of the *Code of Civil Procedure* in view of the provisions of Sec. 31452 of the *Government Code*. (Clk. Tr., p. 1-7)

Petitioner incorporated by reference in her petition, a *Memorandum of Agreement* and attachments, dated July 16, 1963, and filed July 16, 1963, as Exhibit 1, the *Interlocutory Decree of Divorce* and the *Final Judgment of Divorce* in an action pending in the Superior Court of the State of California, for the County of Orange, entitled Joel E. Ogle, Plaintiff, vs. Suzanne G. Ogle, Defendant, being No. 104665.

Petitioner further alleged in her petition that the minor children need the funds allowed them for support, and that they have no other income or assets.

Respondent filed an answer to the petition, alleging as a first affirmative defense that the funds sought to be subject to the process of the court under section 710 of the *Code of Civil Procedure* are not subject to execution, garnishment, attachment or any other process of the court whatsoever under the provisions of Sec. 31452 of the *Government Code*.

The Court filed a judgment denying petitioner's writ; a copy of the judgment is appended hereto.

The Court of Appeal of the State of California, Fourth District, Second Division, affirmed the judgment of the trial court; a copy of the opinion of the Court of Appeal is appended hereto.

The Supreme Court of California granted a hearing, affirmed the judgment of the trial court, and denied a Petition for Rehearing; a copy of the opinion of the Supreme Court of California is appended hereto.

Manner in Which Constitutional Question to be Reviewed was Raised.

The issue on this appeal was first raised in the Memorandum of Points and Authorities in Support of the Petition for Writ of Mandate filed with the Petition for Writ of Mandate, reported commencing at page 11, line 12 of the Clerk's Transcript, as follows:

> "Petitioner contends that as applied to the recovery of support for the minor children of Joel E. Ogle, Sec. 31452 is unconstitutional and particularly violates the provisions of Article I, Section 13, Clause 6 of the *California Constitution*, which states in part:
>
> 'Nor be deprived of life, liberty, or property without due process of law;' and further in violation of the provision of the Fourteenth Amendment, Section 1 of the *United States Constitution*, providing:
>
> 'Nor shall any state deprive any person of life, liberty, or property without due process of law.' "

The issue is discussed in the Memorandum, as reported in the Clerk's Transcript, page 11, line 24 to page 15, line 24.

The trial court denied the Petition for Writ of Mandate without opinion.

The issue of the deprivation of appellant's minor children of the rights guaranteed under the *Fourteenth Amendment to the United States Constitution* was again raised in the appeal to the Court of Appeal of the State of California in Appellant's Opening Brief under the title "*Section 31452 of the Government Code, as applied to the facts of this case, is unconstitutional,*" commencing at page 23 of Appellant's Opening Brief, wherein appellant contends that as applied to the recovery of support for the minor children of Joel E. Ogle, Sec. 31452 of the *Government Code* is unconstitutional and in violation of the guarantees and provisions of the Fourteenth Amendment to the *United States Constitution.* (Appellant's Opening Brief, page 23 to page 26, and page 28).

The Court of Appeal in its opinion answers petitioner's issue, at page 5 as follows:

> "The California cases which permit the exemption of retirement funds carefully note that the exemption does not relieve the judgment debtor from his liability for support, nor does it affect other remedies available to the judgment creditor to enforce the duty to support. (In re *Smallbone, supra,* 16 Cal. 2d 532, 534; *Conaway vs. Conaway,* 218 Cal. App. 2d 427, 429; *Howard vs. Howard, supra,* 166 Cal. App. 2d 386, 389.) Thus, petitioner's claim that the exemption statute (Gov. Code, Sec. 31452) represents a deprivation of property without due process of law in that the minor children are denied a basic and natural right of support is not persuasive, as the exemption of pension moneys from execution may not be construed to relieve a husband or father of his obligation to pay

support money. (See *In re Smallbone, supra; Conaway vs. Conaway, supra.)*"

The Supreme Court of California did not discuss in its opinion the constitutionality of Sec. 31452 of the *Government Code.*

In her Petition for Rehearing, appellant again raised the issue of constitutionality, commencing at page 3 of the Petition for Rehearing, alleging that the application of Sec. 31452 of the *Government Code* is unconstitutional and in violation of the provisions of the *Fourteenth Amendment to the United States Constitution,* (pages 3-7, Petition for Rehearing).

The Supreme Court of California denied the Petition for Rehearing without opinion.

The Federal Question Raised by this Appeal is so Substantial as to Require Plenary Consideration by this Court.

As indicated above, under the statutory law as well as the precedents interpreting the law of California, minor children have a vested property right of support from their father.

As reported, commencing at page 8 of the opinion of the Supreme Court of California, the jurisdictions of New York, New Jersey, Wisconsin and Michigan have held on *substantially identical* statutes that state pension exemption statutes are inapplicable to claims for child support in the absence of language indicating an exceptions for dependents. In addition, precedents from the states of Georgia, Texas, Iowa, Ohio, Pennsylvania, Tennessee, Alabama, Missouri, and the District of Columbia have held that in connection with pension exemption statutes child support is *not* a debt, and a child is not a creditor, nor is a father a debtor in the commercial

sense. (Opinion of the California Supreme Court, page 9, footnote 4).

In diligent search, not a single precedent could be found within the United States which would uphold the validity of an exemption statute relating to pensions against the claim of a minor child for support upon the ground that the child is a commercial creditor and the father is a commercial debtor, and therefore the minor child is bound by the exemption statute, or upon any other ground.

The decision of the Supreme Court of California stands alone in depriving a minor child of a fund created by the earnings of its father and shielding the father against his minor children when they attempt to obtain support from this particular fund.

The authorities cited in the opinion of the Supreme Court of California have universally held that the exemption statutes will not, unless the contrary intention is clearly shown, be construed to enable the father to claim its benefit against the very persons to whom he owes the obligation of support and maintenance, and that to construe the statute otherwise, would, at least in part, defeat its avowed object.

They have held that a court should not be astute in discovering a way to relieve a defendant of his obligations, voluntarily assumed, because of any strict construction of the language of an act which was designed to give protection to the faithful servants of the public *and those dependent upon them.* It was expressed in the cases cited that the purpose of the exemption is to relieve the person exempted from the claims hostile to his dependents' essential needs, as well as his own personal ones, not to relieve him of his family obligations and

destroy what may be the family's only source of security. This, it was held, is the only principle upon which a debtor should be permitted to withhold money within the power of the court from a creditor, the justness of whose claim is undisputed. The purpose of the exemption laws is also stated as to protect an unfortunate debtor and save to him a means of supporting his family, and he cannot avail himself of the statutory exemption to deprive his children of support and maintenance for the protection of which those laws were designed.

The substantiality of the issue raised by this appeal is best illustrated by the language of the opinion in *Shelley vs. Shelley*, 223 Or. 328, 354 Pac. 2d 282, 91 ALR 2d 250, wherein the Court held that a spendthrift trust was amenable to the claims for the support of minor children, and the Court states as follows:

> "The question is whether a person should be entitled to enjoy the benefits of a trust and at the same time refuse to pay the obligations arising out of his marriage.
>
> We have no hesitation in declaring that public policy requires that the interest of the beneficiary of a trust should be subject to the claims for support of his children. England vs. England, supra. Certainly the defendant will accept the societal postulate that parents have the obligation to support their children. If we give effect to the spendthrift provision to bar the claims for support, we have the spectacle of a man enjoying the benefits of a trust immune from claims which are justly due, while the community pays for the support of his children. Wetmore vs. Wetmore, 1896, 149 NY 520, 44 NE 169, 33 LRA 708. We do not believe that it is sound policy to use the welfare funds of this state in support of the beneficiary's children, while he

stands behind the shield of immunity created by a spendthrift trust provision. To endorse such a policy and to permit the spectacle which we have described above would be to invite disrespect for the administration of justice. Seidenberg vs. Seidenberg, D.C. Cir., 1954, 126 F. Supp. 19, 21, affirmed 1955, 96 U.S. App. D.C. 245, 225 F2d 545. One who wishes to dispose of his property through the device of a trust must do so subject to these considerations of policy and he cannot force the courts to sanction his scheme of disposition if it is inimical to the interest of the state. The better reasoned cases in other jurisdictions support this conclusion. Keller vs. Keller, 1936, 284 Ill App. 198, 1 NE2d 773, commented upon in 50 Harv L Rev 143 and 14 Chi-Kent L Rev 276; Zouck vs. Zouck, 1954, 204 Md 285, 104 A2d 573, 105 A2d 214; In re Moorehead's Estate, supra."

On the same issue the Court continues as follows:

"The case of Seidenberg vs. Seidenberg D.C. 1954, 126 F. Supp. 19, 23 affirmed 1955, 96 U.S. App. D.C. 245, 225 F.2d 545, contains an excellent review of the problem. In summary the court said:

'The family is the foundation of society. The duty of a married man to support and protect his wife and children is inherent in human nature. It is a part of natural law, as well as a requirement of the law of every civilized country. It is not an ordinary indebtedness, such as a contractual obligation or a judgment for damages arising out of a tort. It is a responsibility far superior to that of paying one's debts, important as the latter obligation is. No part of a man's property or income should be exempt from meeting this liability, for he is under at least as great a duty to provide shelter, clothing, and food for his immediate family as he is to furnish them for his own person. The law

should not regard with complacency any man who repudiates or ignores this obligation, which is instinctive in mankind, and should not permit him to flout it with impunity.'

The text writers take the same view and in justifying the rule overriding the spendthrift restraint, generally no distinction is made between the claims of dependent children and the claims of the wife for support or alimony. Thus, 2 Scott on Trusts, Sec. 157.1, states:

'. . . The claim of a wife and dependent children to support is based upon the clearest grounds of public policy. They are in quite a different position from ordinary creditors who have voluntarily extended credit. It would be shocking indeed to permit a husband to receive and enjoy the whole of the income from a large trust fund and make no provision for his needy dependents.'

Accord: 6 American Law of Property, Sec. 29.130; 1A Bogert, Trusts and Trustees, Sec. 223; Griswold, Spendthrift Trusts (2d ed), Sec. 339; Note, 14 Temple LQ 229 (1940); Note, 28 Va L Rev 527 (1942)."

The effect of the decision of the Supreme Court of California upon minor children similarly situated to those of appellant, is further illustrated by a decision of the same court, filed the same date as the case at bar, entitled *William L. Miller, Petitioner, vs. The Superior Court of Los Angeles County, et al., Respondents,* appended hereto, reported at 69 Advance California Reports 9, wherein the Supreme Court reversed the decision of the trial court granting a Petition for a Writ of Mandate where the father of minor children had remarried and left the state and was collecting a pension from the Los Angeles Fire Department of $1,352.90 per

month. The reversal of the trial court's judgment was based upon the substantive holding of the Supreme Court in the case at bar which is cited for its ruling that a pension is exempt from attachment or execution by minor children for their support.

It is respectfully submitted that the issue raised by this appeal is substantial for the reasons hereinabove stated, and that unless this Court grants plenary consideration for its resolution, the narrow interpretation of the state statute involved by the Supreme Court of California will result in the deprivation of vested property rights of minor children in violation of the guarantees bestowed by the *Fourteenth Amendment to the United States Constitution.*

CONCLUSION

Appellant Suzanne G. Ogle, respectfully submits that this Honorable Court has jurisdiction of this appeal, and that, if the appeal should be considered as having been improvidently taken, the Court consider it as a petition for writ of certiorari for the reasons stated herein, and prays that the judgment of the Supreme Court of California be reversed.

ERIC A. ROSE
Attorney for Appellant.

APPENDIX 1

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

SUZANNE G. OGLE,

Plaintiff and Appellant,

v.

V. A. HEIM, as County Auditor-Controller, etc.,

Defendant and Respondent;

JOEL E. OGLE,

Real Party in Interest and Respondent.

L.A. 29510

FILED

[illegible], 1968

WILLIAM I. SULLIVAN, Clerk

By [illegible]

S. F. Deputy

APPENDICES

This is an appeal by the plaintiff, Suzanne G. Ogle, from a judgment of the Superior Court of Orange County denying a writ of mandate to compel the Auditor-Controller of Orange County to honor the execution of a judgment for child support from retirement benefits of the judgment debtor. We have concluded that the judgment must be affirmed.

Suzanne Ogle divorced Joel E. Ogle in July 1963 and was awarded custody of their two minor children. Joel was ordered to pay the sum of $150 per month for each child's support, that is, a total sum of $300 monthly. Joel is a retired member of the Orange County Employees

APPENDIX I

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

SUZANNE G. OGLE,

Plaintiff and Appellant,

v.

V. A. HEIM, as County Auditor-Controller, etc.,

Defendant and Respondent;

JOEL E. OGLE,

Real Party in Interest and Respondent.

L.A. 29510
FILED
JULY 10, 1968
WILLIAM I. SULLIVAN, *Clerk*

By.....
S. F. Deputy

This is an appeal by the plaintiff, Suzanne G. Ogle, from a judgment of the Superior Court of Orange County denying a writ of mandate to compel the Auditor-Controller of Orange County to honor the execution of a judgment for child support from retirement benefits of the judgment debtor. We have concluded that the judgment must be affirmed.

Suzanne Ogle divorced Joel E. Ogle in July 1963 and was awarded custody of their two minor children. Joel was ordered to pay the sum of $150 per month for each child's support, that is, a total sum of $300 monthly. Joel is a retired member of the Orange County Employees'

Retirement System receiving a retirement allowance of $222-225 monthly. In September 1963 Joel became physically disabled and has since been unable to work.

Suzanne caused an abstract of judgment and affidavit to be filed pursuant to the provisions of section 710 of the Code of Civil Procedure for the purpose of executing on Joel's retirement allowance, alleging that he was delinquent in child support payments to the extent of $1,315.43. The defendant auditor-controller refused to pay any portion of the retirement benefits into court on the ground that they were exempt from execution. Suzanne sought mandate, and Joel filed a claim of exemption.

Pensions of public employees are exempted by statute from the claims of their creditors. Section 690.23 of the Code of Civil Procedure provides that "All money held, controlled or in process of distribution by the State . . . or other political subdivision . . . derived from the contributions by the State . . . or other political subdivision . . . or by any officer or employee thereof for retirement or pension purposes . . . *are exempt from attachment or execution.*" (Emphasis added.) Section 690.22, the companion to section 690.23, extends exemption to payments after receipt by a resident pensioner. In addition, Government Code section 31452 provides that pensions of retired employees *of a county* "are not subject to execution, garnishment, attachment, *or any other process of court whatsoever, and are unassignable . . .*"
(Emphasis added.)

Numerous other pensions to retired employees of particular governmental entities are also insulated by spe-

cial legislation.[1] Not one of the pension exemption statutes contains any suggestion that dependents are to be treated differently from other creditors. However, on the basis of the frequently repeated formula that the purpose of exemption statutes is to save debtors and their families from want by reason of misfortune or improvidence (e.g., Estate of Crosby, 2 Cal. 2d 470, 473; Bailey v. Superior Court, 215 Cal. 548, 554; Holmes v. Marshall, 145 Cal. 777, 778-779), plaintiff argues that no exemption statutes should bar a claim for child support. More specifically, she urges that the purpose of the statutes is to allow protection to the family as well as to the debtor and that the debtor should not be allowed to use the statutes to protect himself against his family.

Even if this analysis of statutory purpose were precise, it would not be helpful. "The general rule is that a court is not authorized in the construction of a statute, to create exceptions not specifically made. If the statute announces a general rule and makes no exception thereto, the courts can make none." (Stockton Theatres, Inc. v. Palermo, 47 Cal. 2d 469, 476; Vallerga v. Dept. Alcoholic Bev. Control, 53 Cal.2d 313, 318; Wisdom v. Eagle Star Ins. Co., 211 Cal.App.2d 602, 605; People v. Pacific Guano Co., 55 Cal.App.2d 845, 848; see 2 Suther-

[1] E.g., Education Code, section 14407 (Teachers' Retirement Fund); Government Code, section 9359.3 (Legislators' Retirement Fund); Government Code, section 21201 (State Employees' Retirement Fund); Government Code section 32210 (Fire Service Retirement Fund); Public Utilities Code, section 12337 (Municipal Utility District Retirement Fund); Public Utilities Code, section 25337 (Transit District Retirement Funds). See also, 5 U.S.C.A. § 8346 (a) (Federal Employees Retirement Benefits); 42 U.S.C.A. § 407 (Social Security Benefits); Welfare and Institutions Code, section 11002 (Aid and Medical Assistance Benefits). See generally, Committee on Debtor and Creditor, *Modernization of Statutory Exemptions* (1967) 42 State Bar J. 869.

land, Statutory Construction (1943) § 4701 et seq., p. 333 et seq.) The application of the general rule to the pension exemption was recognized in In re Smallbone, 16 Cal.2d 532, 534, where this court said: "There is no exception in the exemption laws which would authorize the satisfaction of an alimony judgment out of exempt property belonging to the husband and it is not the province of the courts to read such an exception into the law, . . ." This case held that although a husband cannot be forced to satisfy his support obligation from exempt pension moneys, he can be held in contempt where the pension moneys evidence an ability to pay. *Smallbone* was followed in Howard v. Howard, 166 Cal.App.2d 386, where plaintiff sought to satisfy a child support order by garnishing her former husband's disability retirement payments from the Los Angeles Fire Department. The court observed that Code of Civil Procedure section 690 provides that "The property mentioned in Sections 690.1 to 690.25, inclusive, this code, is *exempt* from execution or attachment, *except as therein otherwise specially provided*, . . ." (Emphasis added.) No exception to the pension exemption was found, and the court concluded that the pension was exempt from levy and that plaintiff should enforce her claim by other remedies. In Conaway v. Conaway, 218 Cal.App.2d 427, 429, plaintiff appealed from an order denying appointment of a receiver to receive her husband's Air Force retirement checks and apply them to a judgment for accrued alimony. The court held the retirement checks exempt under section 690.22 and affirmed the Judgment, but added: "Exemption from execution does not equate with a refusal to support from funds available, though exempt. Immunity does not necessarily imply impunity."

California exemption statutes have not, as a class, been construed to contain an exception for dependents.[2] The Legislature has repeatedly enacted exemption statutes which make no provision for the special circumstances which pertain upon dissolution of a family; some legislation directly indicates that no special treatment is desired. For example, in its 1959 addition of section 674.5 to the Code of Civil Procedure, the Legislature provided that a judgment for alimony or child support, when recorded, "shall from such recording become a lien upon all real property of the judgment debtor, *not exempt from execution*, . . ." (Emphasis added.) The italicized portion cautiously assures that dependents shall have the same rights in exempt property as other judgment creditors. (See Code Civ. Proc., § 674.)

The only exemption under which dependents have been accorded special treatment is section 690.11 of the Code of Civil Procedure. Section 690.11 renders one-half of a debtor's wages earned within the prior 30 days ex-

[2] Several cases opine in dictum the desirability of exceptions to the exemption statutes for the support of dependents only to find the proposed exception unnecessary on the facts presented. In Willen v. Willen, 121 Cal.App. 351, the court held that a levy upon the proceeds of disability insurance benefits (exempt under section 690.19) was equivalent to foreclosure where a statute permitted foreclosure of liens on exempt property and where the wife had a lien on the community property policies. (Accord, Remley v. Remley, 49 Cal.App. 489 (homestead).) In Yager v. Yager, 7 Cal.2d 213, the court intimated a willingness to create an exception to the homestead exemption in an appropriate case, but refused to do so on the facts of that case. In Bailey v. Superior Court, *supra*, 215 Cal. 548, the court used language favorable to the creation of an exemption but held that where the defendent offered no evidence that certain farm utensils were of a value to be within the exemption of section 690.3, they could be considered in determining wilfullness of nonsupport. Gaskins v. Security-First Nat. Bank, 30 Cal.App.2d 409, involved the interpretation of a federal statute. Although this was seemingly a case within the provisions of section 690.22, that section was not mentioned.

empt, and allows total exemption "if necessary for the *use of the debtor's family.*" (Emphasis added.) Claims of dependents are not barred by the exemption of section 690.11 (Bruton v. Tearle, 7 Cal.2d 48, 53; McIntosh v. McIntosh, 209 Cal.App.2d 374; Henry v. Henry, 182 Cal.App.2d 707; Rankins v. Rankins, 52 Cal.App.2d 231.)[3] The language of section 690.11 invited the creation of an exception by expressly referencing the needs of the debtor's family as a criterion for exemption. By contrast, the pension exception statutes contain no similar criterion and refute any such exception. The peculiar development of the wage exemption is therefore inapposite, despite certain parallels between wages and pensions.

Plaintiff offers cases from other jurisdictions which allow dependents to reach pensions as representative of what she claims is the majority and better rule. We have carefully examined these cases; they are not impressive. Only three jurisdictions — New York (e.g., Hodson v. New York City Employees' R. System (App.Div. 1935) 278 N.Y.S. 16; Legler v. Legler (App.Div. 1935) 278 N.Y.S. 804; Monck v. Monck (App.Div. 1918) 172 N.Y.S. 401; Zwingmann v. Zwingmann (App. Div. 1912) 134 N.Y.S. 1077; Albert v. Albert (Sup.Ct. 1960) 199 N.Y.S.2d 766), New Jersey (Fischer v. Fischer (N.J. 953) 98 A.2d 568), and Wisconsin (Courtney v. Courtney (Wis. 1947) 29 N.W.2d 759; Saunders v. Saunders (Wis. 1943) 9 N.W.2d 629) — have held that state pension exemption statutes are in-

[3] Avilla v. Avilla, 81 Cal.App.2d 210, involved applications of section 690.11, a federal statute, and section 690.10 which exempts seamen's wages. Although the basis of the exception permitted is unclear, the seamen's statute allows the debtor $300, and an exemption in this amount was granted by the court.

applicable to a claim for alimony or child support where the state statute seems absolute on its face and contains no language indicating an exception for dependents. A fourth jurisdiction, Michigan, has held that a municipal exemption ordinance could not bar dependents. (McDonald v. McDonald (Mich. 1958) 88 N.W.2d 398.)[4]

These cases are of little aid because they would find exceptions where none exist. Moreover, we are not persuaded that the blanket exceptions which they effect would be warranted by the public policy of this state. New York has allowed dependents to prevail against public and private pensions in cases involving separation, abandonment, or divorce, and in cases seeking cur-

[4] Other decisions which have allowed claims of dependents against pensions are not germane because they do not involve statutes comparable to those in issue here. A number of cases involving federal statutes relating to veterans benefits hold that alimony and child support are not claims of "creditors" within the meaning of the statutes. (E.g., Gaskins v. Security-First Nat. Bank, *supra*, 30 Cal. App.2d 409; Hannah v. Hannah (Ga. 1940) 11 S.E.2d 779; Stirgus v. Stirgus (Miss. 1935) 160 So. 285; Dillard v. Dillard (Tex.Civ.App. 1960) 341 S.W. 2d 668. See also, Szymanski v. Szymanski (Iowa 1920) 176 N.W. 806; James v. James (Ohio Ct.App. 1942) 44 N.E.2d 368. But see, In re Irish (Idaho 1932) 9 P.2d 501; Riker v. Riker (Sup.Ct. 1936) 289 N.Y.S. 835; Commonwealth v. Berfield (Pa.Super. Ct. 1947) 51 A.2d 523; Brewer v. Brewer (Tenn.Ct.App. 1933) 84 S.W.2d 1022.)

Dependents' claims against pensions unprotected by any statute are common. The cases may involve such diverse questions as the efficacy of a nonassignment clause in a private commercial pension (e.g., Kendrick v. Kendrick (Ala. 1960) 124 So.2d 78; Thiel v. Thiel (N.J. 1964) 197 A.2d 354; but see, Thomas v. Thomas, 192 Cal.App.2d 771; Hoffman v. Hoffman (N.J. 1951) 84 A.2d 441), or the effect of sovereign immunity (Montgomery v. Montgomery (C.A.D.C. 1946) 153 F.2d 634).

At least two states provide by statute that no exemption is effective against a claim for alimony. (Tenn. Code, Vol. 5, § 26-210; Vernon's Annot.Mo.Stat., § 452.140; see Pugh v. St. Louis Police Relief Assn. (Mo.Ct.App. 1944) 179 S.W.2d 927; but see, Ferneau v. Armour and Co. (Mo.Ct.App. 1957) 303 S.W.2d 161, 168-169 (exception does not apply to child support).)

rent pension payments, the pension fund from which the payments are disbursed, or an employee's future interest in the fund. (E.g., La Hondere v. La Hondere (App. Div. 1939) 9 N.Y.S.2d 918; Fox v. Fox (App.Div. 1950) 93 N.Y.S.2d 620; Jackson v. Jackson (Sup.Ct. 1948) 86 N.Y.S.2d 516; Anonymous v. Anonymous (Family Ct. 1963) 246 N.Y.S.2d 93; cases cited, *supra.)* The decisions go far beyond the simple holding that dependents may garner the pension payments which plaintiff seeks here, and such great liberality would appear to be unwise. Allowing forced sales of pensions prior to the time they become payable results in loss to the employee and cost to the pension system disproporationate to any benefit to creditors. (Cf. Note, *Legal Problems of Private Pension Plans* (1957) 70 Harv.L.Rev. 490, 499.) Waste, confusion, and disparity of treatment are potentially incident to a legislatively unlimited exception. Such would be destructive of socially invaluable methods of providing for old-age security through programs of enforced savings and investment. (See 2 Assembly Interim Committee Report No. 11, Industrial Relations (1965-1967) (Pension Plans and Public Policy in California).)

Further, many of the foreign cases fail to recognize that exemptions are not the only legal armor protecting pensions. Pension administrators too have a substantial and abiding interest in maintaining the integrity of their funds and assuring eventual security against profligacy and misfortune. To protect participants' and employers' interests, pension rights are typically made nonassignable. As noted, Government Code section 31452 renders the pension which plaintiff seeks not only exempt but also "unassignable," thereby restricting

voluntary as well as involuntary alienation. Nonassignability has been validated by statute and decision, and independently of exemption laws, operates as a defense against creditors.[5] In Thomas v. Thomas, *supra*, 192 Cal.App.2d 771, for example, plaintiff was blocked from enforcing an alimony judgment against a private, unfunded pension system of which her former husband was a beneficiary. The court reasoned that since nonassignment clauses were effective in pension trusts and pension annuity contracts, they must also be effective in other contractual pension plans.

It may be noted that dependents do have remedies against the recalcitrant, of which contempt is the most efficacious. Because section 690.22 does not apply to nonresidents, pensioners against whom contempt is unavailable may nevertheless be subject to the Uniform Reciprocal Enforcement of Support Act. (Code Civ. Proc.,

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[5] Statutes exempting particular pensions, like Government Code, section 31452, which deals with pensions of county employees, may provide that pensions are "unassignable."

In addition to statutes relating to particular pensions, a number of statutes affect particular funding devices, public or private. For example, Insurance Code section 10129.5 provides that the transferability provisions of the Insurance Code are inapplicable to benefits under annuity contracts qualified under Internal Revenue Code section 401 (g). Insurance Code section 10129 provides that group and individual policies may be unassignable. (See also, Ins. Code, § 10213 (group life insurance proceeds exempt); Code Civ. Proc. § 690.19 (certain life insurance proceeds exempt); Ins. Code, § 101; Note, 28 A.L.R.2d 1213; Detroit Greyhound Emp. Fed. Cr. U. v. Aetna Life Ins. Co. (Mich. Ct. App. 1967) 151 N.W.2d 852.)

Although the validity of spendthrift retirement trusts has not been decided in California, spendthrift trusts as such, are valid. (Civ. Code, §§859, 867; see Lowe v. Jones (Pa. 1964) 200 A.2d 880; Hyland, *Is the Beneficiary of a Spendthrift Retirement Trust a Fox That can be Cornered?* (1952) 27 L.A.Bar Bull. 441.) Spendthrift trusts effectively bar dependents as well as other creditors. (Canfield v. Security-First Nat. Bank, 13 Cal.2d 1; Smith v. Smith, 51 Cal.App.2d 29; San Diego Trust etc. Bank v. Heustis, 121 Cal.App. 675.)

§ 1650 et seq.) If dependents are to have further remedies, a consistently hostile battery of statutes will have to be circumvented and parity of treatment among pensioners regardless of vagaries of funding should be effected. In view of the present clarity of statute and decisional law, the burden of change, if any, and its extent should be on the Legislature and not this court.

The judgment is affirmed.

PETERS, J.

WE CONCUR:
TRAYNOR, C. J.
McCOMB, J.
TOBRINER, J.
MOSK, J.
BURKE, J.
SULLIVAN, J.

APPENDIX II

COURT OF APPEAL, FOURTH DISTRICT
SECOND DIVISION
STATE OF CALIFORNIA

SUZANNE G. OGLE,
Plaintiff and Appellant,

vs.

V. A. HEIM, Auditor-Controller of the County of Orange, State of California,
Respondent.

No. 4 Civil 8343

OPINION

APPEAL from a judgment of the Superior Court of Orange County. William S. Lee, Judge. Affirmed.

Proceeding in mandamus to compel the auditor-controller of the County of Orange to honor the execution of a judgment for child support from retirement benefits of the judgment debtor. Judgment denying writ affirmed.

Eric A. Rose for Petitioner and Appellant.

Adrian Kuyper, County Counsel, and James S. Okazaki, Deputy County Counsel, for Respondent.

No appearance by Real Party in Interest Joel E. Ogle.

This is an appeal from a judgment denying a writ of mandate based upon a petition filed by Suzanne G. Ogle, wherein it was alleged: That the petitioner was the defendant and cross-complainant in an action for divorce filed in the Orange County Superior Court; that the

court issued an order in the divorce proceeding awarding her the care, custody and control of the two minor children of petitioner and the real party in interest herein, Joel E. Ogle; that the said Joel E. Ogle was ordered to pay the petitioner the sum of $150.00 per month per child, comprising the total sum of $300.00 monthly for the care, maintenance and support of said minor children; that Joel E. Ogle was formerly county counsel of Orange County, has retired, and receives a retirement allowance of $222-225 per month as a member of the Orange County Employees' Retirement System; that the father failed to pay child support pursuant to said order, and that petitioner consequently caused an abstract of judgment and affidavit to be filed pursuant to the provisions of section 710 of the Code of Civil Procedure for the purpose of executing on the retirement allowance of the father for delinquent child support in the sum of $1,315.43; that the respondent-auditor refused to pay any portion of the retirement benefits into court pursuant to said levy on the ground that the retirement benefits were exempt from garnishment; and that the county auditor should be compelled to honor the levy.

The petition and the answers filed by the county and real party in interest contain the following supplemental information: Joel E. Ogle became a member of the Orange County Employees' Retirement System on January 1, 1945, when the system was initially adopted by the County of Orange; he and petitioner herein were married on February 24, 1954; Joel retired from government service on March 1, 1960, and commenced to receive a retirement allowance which presently amounts to $222-$225 monthly; Joel and Suzanne were divorced on July 16, 1963; Joel was ordered to pay child support

as herein reflected; in September 1963 Joel became physically disabled and has been unable to be gainfully employed since that time; Joel was unable to make the child support payments as ordered by the court, which culminated in the issuance of the abstract of judgment in the sum of $1,315.43.

The sole issue to be determined on appeal is whether the retirement benefits of the former county counsel are subject to execution by his divorced wife for the purpose of enforcing child support payments owed by him pursuant to court order.

At common law, a judgment creditor could not levy a garnishment upon a public entity such as a county. *(Lay v. Hammond,* 212 Cal. 665, 667; *Ruperich v. Baehr,* 142 Cal. 190, 196; *Weiser v. Payne,* 110 Cal. App. 378, 380.) Section 710 of the Code of Civil Procedure is a modification of the law of sovereign immunity whereby the Legislature has provided a special method for the subjection of debts due from such entities to the lien of a judgment. *(Irilarry v. City of San Diego,* 186 Cal. 535, 537; *Vaughn v. Condon,* 52 Cal. App. 713, 714.) In applying section 710 of the Code of Civil Procedure, California courts have been cognizant that the procedures prescribed therein constitute a relinquishment of sovereignty, and have followed a policy of strict interpretation of the section. (See *Lay v. Hammond, supra, at* 668-669; *Weiser v. Payne, supra.)*

Section 31452 of the Government Code provides with respect to pensions, annuities, and retirement allowances as follows:

> "... They are not subject to execution, garnishment, attachment, or any other process of court whatsoever, and are unassignable ..."

Petitioner herein maintains that the exemption statute, as embodied in section 31452 of the Government Code, should not be available to a father who is endeavoring to avoid the obligation of supporting his minor children.

However, there is no exception in the exemption laws which authorizes the satisfaction of an *alimony* judgment out of exempt property belonging to the husband, and the husband's pension is exempt from execution for satisfaction of an alimony judgment. *(In re Smallbone*, 16 Cal. 2d 532, 534; *Thomas v. Thomas*, 192 Cal. App. 2d 771, 784.) Moreover, the precise issue presented herein has been previously decided under exemption statutes similar in language and scope to section 31452 of the Government Code. Monthly disability payments received by a city fireman have been expressly held to be exempt from execution under sections 690.22 and 690.23 of the Code of Civil Procedure for *child support* payments owed by the fireman. *(Howard v. Howard*, 166 Cal. App. 2d 386, 387.)

Petitioner relies on multiple foreign decisions which hold in effect that wages, disability and retirement benefits are not exempt from garnishment or execution where the judgment is based on an alimony or child support award. (See *Kendrick v. Kendrick* (1960, Ala.) 124 So. 2d 78; *Montgomery v. Montgomery* (1946) 80 App. DC 334 [153 F. 2d 634] *Zwingmann v. Zwingmann* (1912) 150 App. Div. 358 [134 N.Y. Supp. 1077]; *Commonwealth v. Berfield* (1947) 160 Pa.Super 438 [51 A.2d 523]; *Courtney v. Courtney* (1947) 251 Wis. 443 [29 N.W. 2d 759]; Anno. 54 ALR 2d 1422, 1436-1437.) Generally, the rationale of the foreign cases is to the effect that the exemption laws were enacted for the pur-

pose of giving protection not only to the employee or pensioner, but those dependent upon him, and that inasmuch as the exemption of an employee's earnings or pension is for the protection of the family, the wage-earner or pensioner should not be permitted to use the exemption statute as a shield against the very persons for whose benefit the exemption was created. (See *Mickenheim v. Cathcart* (1955) 228 La. 890 [84 So. 2d 449]; 54 ALR 2d 1418.) Nevertheless, with limited exceptions not applicable herein, it is the law of this forum that "... a judgment for alimony does not confer upon the judgment creditor thereunder a special status entitling her to seize assets otherwise exempt from execution. Notwithstanding a contrary position in other jurisdictions, California appears clearly to be one of those states in which the divorced wife, as the beneficiary of an alimony decree, has no status different than of other judgment creditors." *(Thomas v. Thomas, supra,* 192 Cal. App. 2d 771, 783-784; see *San Diego Trust & Savings Bank v. Heustis,* 121 Cal. App. 675, 688, 689; *Lisenbee v. Lisenbee,* 42 Cal. App. 567, 570.)

The California cases which permit the exemption of retirement funds carefully note that the exemption does not relieve the judgment debtor from his liability for support, nor does it affect other remedies available to the judgment creditor to enforce the duty to support. *(In re Smallbone, supra,* 16 Cal. 2d 532, 534; *Conaway v. Conaway,* 218 Cal. App. 2d 427, 429; *Howard v. Howard, supra,* 166 Cal. App. 2d 386, 389.) Thus, petitioner's claim that the exemption statute (Gov. Code, § 31452) represents a deprivation of property without due process of law in that the minor children are denied a basic and natural right of support is not persuasive, as the exemp-

tion of pension money from execution may not be construed to relieve a husband or father of his obligation to pay support money. (See *In re Smallbone, supra; Conaway v. Conaway, supra.)*

The judgment is affirmed.

(s) Kerrigan

J.

WE CONCUR:
McCABE, P.J.
TAMURA, J.

Certified for nonpublication, Rule 976:
McCABE, P.J.
KERRIGAN, J.
TAMURA, J.

APPENDIX III

FILED MAR 18 1966 W. E. ST JOHN, County Clerk
By REC Deputy

ENTERED IN BOOK JUDGMENTS No. 115 Page 269 Date MAR 21 1966

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

SUZANNE G. OGLE, Petitioner, vs. V. A. HEIM, etc., Respondent.

NO. 145165
JUDGMENT DENYING WRIT

The above entitled cause came on regularly for hearing in Department 19 of the above entitled Court on the 25th day of February, 1966, the Honorable WILLIAM S. LEE, Judge presiding, sitting without a jury, a jury having been expressly waived, ERIC A. ROSE appearing as attorney for petitioner, ADRIAN KUYPER, County Counsel, and WILLIAM J. McCOURT, Deputy County Counsel, by WILLIAM J. McCOURT, appearing for respondent, V. A. HEIM, and JOEL E. OGLE appearing in propria persona, and oral and documentary evidence having been introduced and the cause having been duly submitted for decision:

IT IS HEREBY ORDERED that the peremptory Writ is denied and the alternative Writ is discharged ([initialed by WSL])

Dated this 16 day of March, 1966.

Wm. S. Lee LBM
JUDGE OF THE SUPERIOR COURT

APPENDIX IV

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

WILLIAM L. MILLER,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY et al.,

Respondents;

VIRGINIA ANN MILLER,

Real Party in Interest

L.A. 29509
FILED
JULY 10, 1968
WILLIAM I. SULLIVAN, *Clerk*
By .....
S. F. Deputy

William L. Miller petitions for a writ of mandate to compel the Superior Court of Los Angeles County to vacate its order for the payment of alimony and child support from his pension.

Virginia Ann Miller filed an action for divorce against William in 1961. Virginia was awarded custody of their minor child and William was ordered to pay $300 per month as alimony and $150 per month as child support. William has remarried and left the state. He is a retired chief engineer of the Los Angeles Fire Department Receiving a pension of $1,352.90 per month. On April 24, 1967, following a hearing on an order to show cause and

a finding that William was in arrears in payments in excess of $3,500, the court ordered the Manager and Secretary of the Department of Pensions of the City of Los Angeles to remit pension moneys in the sum of $450 per month to Virginia for alimony and child support.

William contends that the trial court exceeded its jurisdiction in making the order directing payment to Virginia because his pension is exempt from execution and attachment under section 690.23 of the Code of Civil Procedure. Section 690.23 provides in pertinent part: "All money held, controlled or in process of distribution by the State or a city . . . derived from the contributions by the State or such city . . . or by any officer or employee thereof for retirement or pension purposes . . . are exempt from attachment or execution." We have held in Ogle v. Heim, ante, p. , that the statute means exactly what it says. William's pension is exempt. Virginia's argument that the *form* of the court's order places it without the ambit of prohibited attachment or execution is without merit. The *effect* of the order is plain. If this order does not contravene the exemption statute, then any creditor could circumvent any exemption by obtaining an order in comparable form.

The action of the court in creating an exception not found in the statute was error in excess of its jurisdiction. (Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 291.) The court not only declined to follow rules established by courts of superior jurisdiction holding pensions exempt (In re Smallbone, 16 Cal. 2d 532; Howard v. Howard, 166 Cal.App.2d 386; Conaway v. Conaway, 218 Cal.App.2d 427), but failed to adhere to the exclusive procedure for reaching debts owed by government to third parties as set forth in Code of Civil Pro-

cedure section 710 (Wilson v. Walters, 19 Cal.2d 111; Dept. of Water & Power v. Inyo Chem. Co., 16 Cal.2d 744; Ott Hardware Co. v. Davis, 165 Cal. 795; Weiser v. Payne, 110 Cal.App. 378; Credit Bureau of San Diego v. Getty, 61 Cal.App.2d Supp. 823, 833). In refusing to follow binding precedent (Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450, 454) and procedures demanded by the code, the court exceeded its defined powers. (City & County of S.F. v. Superior Court, 53 Cal.2d 236, 244; Swycaffer v. Swycaffer, 44 Cal.2d 689, 693; H. J. Heinz Co. v. Superior Court, 42 Cal.2d 164, 173-175; Burtnett v. King, 33 Cal.2d 805, 807; Howard v. Superior Court, 25 Cal.2d 784, 789; 1 Witkin, Cal. Procedure, Jurisdiction, § 135 et seq., p. 397 et seq.)

Virginia contends that mandate should not issue because William has an adequate remedy by appeal. The Court of Appeal, however, decided that the remedy by appeal was inadequate when it issued the alternative writ, and, because no purpose but delay would be served by reviewing that decision, we may and do accept it for the purpose of this proceeding. (Weber v. Superior Court, 53 Cal.2d 403, 406; Atkinson v. Superior Court, 49 Cal. 2d 338, 342; Bowles v. Superior Court, 44 Cal.2d 574, 582.)

Let a peremptory writ of mandate issue as prayed.

PETERS, J.

WE CONCUR:
TRAYNOR, C.J.
McCOMB, J.
TOBRINER, J.
MOSK, J.
BURKE, J.
SULLIVAN, J.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 617

SUZANNE G. OGLE,

Appellant,

vs.

V. A. HEIM, Auditor-Controller of the County of Orange, State of California,

Respondent.

MOTION OF RESPONDENT TO DISMISS.

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IN THE

Supreme Court of the United States

October Term, 1968
No. .....

SUZANNE G. OGLE,

Appellant,

vs.

V. A. HEIM, Auditor-Controller of the County of Orange, State of California,

Respondent.

MOTION OF RESPONDENT TO DISMISS.

Respondent in the above-entitled case moves to dismiss Appellant's Appeal from the Supreme Court of California on the ground that the judgment of said Court rests on an adequate non-federal basis.

Statement of Facts.

The decision of the Supreme Court of California sought to be reviewed upheld a lower court decision denying a writ of mandate to compel the Auditor-Controller of Orange County, California, to honor the execution of a judgment for child support from retirement benefits of Joel E. Ogle, a former County employee. California Government Code Section 31452 exempts such retirement allowances from "execution, garnish-

ment, attachment, or any other process of court whatsoever." The California Supreme Court interpreted said Section 31452 in conjunction with various sections of the California Code of Civil Procedure pertaining to execution of judgments and concluded that said retirement benefits, under the laws of this State, were exempt from court process. The Court did not allude to any constitutional argument in its decision.

ARGUMENT.

1. State Court Decisions Based Upon Adequate Non-Federal Grounds Are Not Reviewable in Federal Courts.

The United States Supreme Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal ground. This is premised upon the fact that the federal court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. In order to be an adequate nonfederal ground, such ground must be "independent" and "broad enough to sustain the judgment."

Moran v. Horsky, 178 U.S. 205, 20 S. Ct. 856, upheld a state court decision which was primarily based upon the defense of laches, but also involved was the question of legal title under a patent issued to a tract of federal public land, the United States Supreme Court holding that the defense of laches was an "independent non-federal question, one broad enough to sustain the judgment. . . ."

In *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.,* 243 U.S. 157, 37 S. Ct. 318, the United States Supreme Court dismissed for want of jurisdiction an appeal from a state court decision involving water rights when the non-federal ground of estoppel was made "an independent ground of the judgment," separately from the Federal question of whether the State Board of Irrigation's procedures had infringed upon the due process and equal protection provisions of the 14th Amend-

ment. The United States Supreme Court observed that, "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

Fox Films Corp. v. Miller, 296 U.S. 207, 56 S. Ct. 183, involved the question of the legality of an arbitration clause in a motion picture exhibition contract, and also whether the contract violated the Sherman Anti-Trust Act. The United States Supreme Court held that the state court's ruling that the concededly illegal arbitration clause was inseparable from the rest of the contract was "clearly a question of general and not of federal law" and was sufficient to sustain the judgment without reaching the federal question as to the validity of the contract under the Act.

2. The State Court Judgment Here Is Based Upon a Non-Federal Ground.

Numerous federal cases stand for the proposition that no federal question is presented by the decision of a state court construing its statutes or constitution, whether or not the court was persuaded by a misunderstanding of federal law. *Murdock v. Memphis,* 20 Wall. 590, 22 L. Ed. 429. *Berea College v. Kentucky,* 211 U.S. 45, 29 S. Ct. 33.

In the instant case the major thrust of Appellant's position in the California courts was that Code of Civil Procedure Section 710 provides for the garnishment of moneys owing to a judgment debtor by a public entity and that Government Code Section 31452, which whol-

ly exempts from court process pension rights and the money in a fund created under the County Employees Retirement Law of 1937, should not be interpreted so as to include child support payments in such exemption from court process. Appellant's legal briefs were almost entirely devoted to the proper interpreting of said state statutes.

Secondarily, and with no separate authority cited for the proposition, Appellant contended that the interpretation given by the trial court and the District Court of Appeal to said Section 31452 served to deprive the minor children of their property without due process of law, in violation of the California and Federal Constitutions.

The issue so obviously centered upon an interpretation of a state statute that neither the District Court of Appeal nor the State Supreme Court devoted a single line or word to any constitutional issue. The Supreme Court noted a whole battery of California statutes which insulate by special legislation pensions to retired governmental employees, not one of which "contains any suggestion that dependents are to be treated differently from other *creditors*." The Supreme Court then proceeded to cite the decisional law of the State upholding such exemptions; *In re Smallbone*, 16 Cal. 2d 532, for example. The Court considered contrary holdings in other states and found them to be "not impressive" and not "warranted by the public policy of the state." It also noted that under the laws of this State "dependents do have remedies against the recalcitrant, of which contempt is the most efficacious." The Court concluded by stating that,

> "In view of the present clarity of statute and decisional law, the burden of change, if any, and its extent, should be on the Legislature and not this court."

Patently, the State Supreme Court's decision was based on a nonfederal ground, and it was not necessary to the decision to reach a federal ground, if such exists in this case. As indicated in *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., supra,* the due process clause does not make all questions pertaining to the interpretation of state statutes into constitutional questions. Otherwise, the highest courts of the several states would be mere stepping stones in the path of every unsuccessful litigant on his march to the United States Supreme Court.

3. The Non-Federal Ground Is Adequate to Support the State Court Judgment.

> "State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their state law." (*Greenough v. Tax Assessors,* 331 U.S. 486, 67 S. Ct. 1400, 172 A.L.R. 329).

Just as in *Greenough* where the United States Supreme Court found no precedent to indicate "that the federal constitution contains provisions that forbid taxation by a state of intangibles in the hands of a resident testamentary trustee," Respondent submits that there is no provision in the United States Constitution which

forbids a state from exempting certain classes of property, or rights therein, from attachment, garnishment, or other legal process. Here, the State Supreme Court's decision rests upon a fair and substantial basis. It is founded upon a number of other California statutes exempting pensions from legal process and California court decisions upholding and interpreting them, all evidencing a clear public policy of the state protecting pension rights from legal process. Clearly, said decision was not drafted so as to evade any constitutional guarantee.

Statutes pertaining to garnishment and other execution by court process, as well as exemption statutes, are procedural matters of a local nature, and their interpretation is not a proper federal question. Such statutes do not concern themselves with property rights in the funds which are exempt from execution.

The case of *Schooley v. Schooley,* 184 Iowa 835, 169 N.W. 56, 11 A.L.R. 110 upheld a lower court's grant of a motion to discharge the garnishee in an action brought by an ex-wife under an alimony award to reach the wages of her ex-husband. The specific holding is not important here and, in fact, it appears that the Iowa statute was subsequently amended in favor of the "creditor." Of significance, however, is the statement of the Iowa Supreme Court that,

> "Taking the country over, there are perhaps no two states in which the exemption statutes are so nearly identical that the construction and effect given to one jurisdiction may be said to be satisfactory precedent for the construction and effect of another in another jurisdiction. Again, there is no uniform policy of the courts in general with

> respect to these laws. In some they are construed and applied with great liberality . . . while in others the tendency is to the opposite extreme. . . . Exemptions being strictly creatures of the statute, the question when the right exists, and the scope of such right, resolves itself, in final analysis, into one of construction of the legislative language, and in such matters the courts of each state ordinarily adhere to their own views of the expressed legislative intent."

The matter of enforcement of alimony claims against statutory exemptions is the subject of annotations at 11 A.L.R. 123, against homesteads at 106 A.L.R. 669, and against disability insurance at 130 A.L.R. 1028. In affirmation of Respondent's contention that this is purely a local, non-federal question, it is to be noted that not a single citation in any of these three annotations is from the United States Supreme Court.

4. No Special and Important Reasons Exist for a Review on Writ of Certiorari.

Appellant concludes his petition by requesting that the petition be considered in the alternative as one for a writ of certiorari. No additional reasons are cited as to why this writ should be granted. Respondent refers to his reasons hereinabove set forth as to why certiorari should not be granted. Certainly, the state court's judgment sustaining a state statute on a matter of state procedure is an adequate non-federal ground. No "special and important reasons" exist for review by way of such writ (Rule 19), and Appellant has asserted none in support of her request.

Conclusion.

Respondent respectfully submits that the judgment of the Supreme Court of California rests on an adequate non-federal basis and that this Honorable Court has no jurisdiction over this appeal; that, in addition, no special and important reasons exist for a grant of writ of certiorari by this Honorable Court; and that, therefore, this Motion to Dismiss should be granted.

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

OGLE *v.* HEIM, AUDITOR-CONTROLLER OF COUNTY OF ORANGE.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 617. Decided December 16, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.